EAST PRODUCE, INC. v. SEVEN SEAS TRADING CO., INC., a/t/a VALLEY VIEW FARMS.
PACA Docket No. R-97-0142.
Decision and Order filed August 14, 2000.

Jurisdiction.

The Department does not have jurisdiction to resolve the issue of an alleged "joint venture" agreement where the complaining party's cause of action accrued in 1992 and the party in question failed to pursue its cause of action until 1997, well beyond the nine month statute of limitation under the PACA. Respondent alleges in its counterclaim that it entered into a joint venture agreement with Complainant to provide consulting services in exchange for 2% of the 18% commission that Complainant was receiving in connection with a separate marketing agreement with a farmer in Mexico. The alleged oral contract covers the years from 1991-1996 and the Respondent did not request payment of its consulting fees until 1997, although Complainant was being paid its commission fees on a yearly basis under the marketing contract with the Mexican farmer.

Kimberly D. Hart, Presiding Officer.
John Watkins, Glendora, CA, for Complainant.
Wesley Chen, White Plains, NY, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq*.), hereinafter referred to as the Act. A timely informal complaint was filed in which Complainant seeks a reparation award against Respondent in the amount of $60,472.00 in connection with the sale of various fruits and vegetables, perishable agricultural commodities in interstate commerce. A copy of the report of investigation prepared by the Department was served upon each of the parties. A copy of the formal complaint was served upon Respondent, which filed an answer thereto, denying the allegations of the complaint and asserting a counterclaim. The counterclaim was served on Complainant. Complainant filed a timely reply to the Respondent's counterclaim.

Since the amount claimed as damages exceeds $30,000.00 and the Respondent requested an oral hearing, an oral hearing was held in accordance with section 47.15 of the Rules of Practice (7 C.F.R. § 47.15). The oral hearing was held on November 3, 1998, in New York, New York and further testimony was taken by telephone conference on November 9-10, 2000, due to the various scheduling conflicts before Kimberly D. Hart, Presiding Officer. The Complainant was represented by John F. Watkins, Esq. and Nolan E. Clark, Esq. of Watkins & Watkins located in Glendora, California and the Respondent was represented by Peter Meisels, Esq. of Serchuk & Zelermyer located in White Plains, New York.

After the hearing, the parties were afforded the opportunity to file proposed findings of fact and conclusions of law as well as briefs in support thereof and

claims for fees and expenses. A deadline of April 6, 2000, was imposed for both parties. Both parties submitted their findings of fact and supporting briefs as well as claims for fees and expenses by the imposed deadline. The documents were served on the respective parties by the Department in accordance with the Rules of Practice and neither party elected to file objections to the opposing party's claim for fees and expenses within the time period set forth in section 47.19(5) of the Rules of Practice (7 C.F.R. § 47.19(5)).

Findings of Fact

1. Complainant, Far East Produce, Inc., is a corporation whose mailing address is 1040 S. San Julian Street, Los Angeles, California 90015. Complainant is licensed under the Act.

2. Respondent, Seven Seas Trading Co., Inc. a/t/a Valley View Farms, is a corporation whose mailing address is 119 Christie Street, New York, New York 10002. At the time of the transactions alleged herein, Respondent was licensed under the Act.

3. Complainant, on or about February 29th and May 17, 1996, sold to Respondent, in the course of interstate commerce, thirty-six (36) lots of mixed fruits and vegetables, being perishable agricultural commodities, at the agreed contract price totaling $68,006.50. Complainant shipped the produce to Respondent on or about February 29th through May 17, 1996, in accordance with the oral contract and the produce was received and accepted by the Respondent upon arrival. Respondent remitted a partial payment in the amount of $7,534.50 to complainant, leaving a remaining balance due in the amount of $60,472.00. Respondent has failed to pay complainant the remaining amount due for its produce purchases. Complainant admits that it owes Respondent $2,223.00 for box charges in connection with other produce transactions to which it agrees to an offset to the amount owed by Respondent. Therefore, Respondent has failed to pay Complainant in the amount of $58,249 for its produce purchases after allowance of the offset in the amount of $2,223.00.

4. The informal complaint was filed on July 25, 1996, which is within nine months from when the cause of action accrued.

Conclusions

There are three major issues to be resolved in this decision. The **first** issue is whether Complainant has carried its burden of proving that Respondent owes it for produce purchases in the amount of $60,472.00. The **second** issue is whether Respondent is entitled to a further offset on any amounts found to be owing to Complainant for its produce purchases for alleged transportation costs that it incurred on behalf of Complainant and compensation for box charges. The **third**

issue is whether the Department has jurisdiction over Respondent's counterclaim alleging that Complainant owes it approximately $250,000 in "consulting fees" in connection with the growing, marketing and sale of the Podesta Farm produce from 1991 to 1996, and if so, whether Respondent has carried the burden of proving its counterclaim. There was a great deal of testimony taken in relation to the issues in question and the presiding officer is charged with the responsibility of judging the credibility of the witnesses' testimony. The credibility of the witnesses will be a major factor in deciding on the issues as well as the weight accorded to the voluminous documentation introduced into evidence.

As the moving party, Complainant bears the burden of proving its case that Respondent owes it for produce purchases received and accepted in accordance with the contract terms. *La Casita Farms, Inc. v. Johnson City Produce Co.*, 34 Agric. Dec. 506 (1975); *New York v. Sandler*, 32 Agric. Dec. 702 (1973). The party with the burden of proof must meet the preponderance of evidence test. *A.D. McGinnis Produce v. Pinder's Produce Co.*, 28 Agric. Dec. 249 (1969). Complainant has submitted evidence documenting the produce transactions at issue including invoices and transportation documents that reflect the shipping of the pertinent produce to the Respondent (*see Exhibit no. 1 contained in the report of investigation*). Respondent, in its answer, generally denies Complainant's allegations but admits the "receipt of certain shipments of produce from Far East during the time period alleged (*see Respondent's answer to formal complaint*). The complaint does not specifically state the terms of contracting for the loads in question, however, the transportation documents do indicate that the respondent, as purchaser, was responsible for the freight charges associated with the shipping of said produce. "In an f.o.b. transaction, the buyer is responsible for paying freight . . . ." *In re Ben Gatz Company*, 38 Agric. Dec. 1038 (1979). In addition, case law precedent dictates that ". . . the existence of f.o.b. terms are [sic] are assumed when the contract is silent as to the terms of delivery. *Hunts Point Tomato Co., Inc. v. S & K Farms, Inc.*, 42 Agric. Dec. 1224, 1225 (1983). See UCC § 2-503, Comment 5. See also J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code, § 5-2, page 143 (1972). Based on the foregoing, we find that the produce transactions in question were subject to f.o.b. terms.

Complainant has submitted persuasive evidence to support its allegation that the produce was shipped to respondent on the various dates. In a f.o.b. transaction, the Regulations mandate that "the buyer assumes all risk of damage and delay in transit not caused by the seller". 7 C.F.R. § 46.43(i). There is no evidence to suggest that there were any problems encountered during the transportation of the produce in question. In addition, the Respondent is responsible for the produce in f.o.b. transactions even if it never receives the produce as long as the seller has not caused problems in the shipment of the produce such as lack of reasonable care in the selection of the transportation company or failing to give proper shipment instructions. *Progressive Groves v. Bittle*, 31 Agric. Dec. 436 (1972); *Gilmer*

Packing v. D.L. Piazza Co., 21 Agric. Dec. 783 (1962). Therefore, Respondent is deemed to have received and accepted the produce in these f.o.b. transactions. A buyer who accepts produce becomes liable to the seller for the full purchase price thereof, less any damages resulting from breach of contract by the seller. *Norden Fruit Co., Inc. v. E D P Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company Inc.*, 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987).

Respondent has not alleged any breach of contract by the seller that would entitle it to damages but Respondent does allege that the agreed upon contract prices were incorrectly noted by Complainant on its invoices and were later modified by mutual agreement of the parties. The party who alleges a modification of the contract terms bears the burden of proving such allegation. *Regency Packing Co., Inc. v. The Auster Company, Inc.*, 42 Agric. Dec. 2042 (1983); *F.H. Hogue Produce v. Singer's Sons*, 33 Agric. Dec. 451 (1974). According to Respondent, three (3) of the thirty-six (36) produce transactions at issue were invoiced incorrectly by the complainant despite the fact that the parties had mutually agreed on different contract prices prior to shipment. Respondent contends that invoice #159798 was incorrectly billed at $25 per box versus the agreed upon price of $15 per box; invoice #160136 was incorrectly billed at $25 per box versus the agreed upon price of $15 per box; and invoice #160209 was incorrectly billed at $18 per box versus the agreed upon price of $15 per box (Tr. at 81-85). Respondent also contends that it contacted Complainant about the price discrepancies and the parties mutually agreed that the contract prices would be modified to $15.00 per box for each of the three invoice numbers (Tr. at 84-85). Respondent submitted its purchasing and receiving record for the three different shipments which reflect that the original price was quoted as $25 per box but was later changed to $15 per box for invoice #159798 (Rx-TT) by Respondent's employee. The purchase and receiving records for invoice #s 160136 and 160209 (Rx-RR & Rx-SS) indicate an original price of $15 per box versus the prices contained in Complainant's invoice for the same transactions.

Complainant's principals testified that its records do not reflect price modifications for any of the three relevant transactions and that, while Respondent did contact Complainant subsequent to shipment to request a change in the price, Complainant declined to grant the reduction because the proceeds from those transactions had already been reported to the farmer at the originally invoiced prices (Tr. at 23-30, 265-67). Complainant also submitted, as evidence, a copy of a letter, dated July 1996, sent to Respondent in response to its request for a price modification which basically mirrors the testimony provided at hearing (*Exhibit 1a in report of investigation*). Respondent has submitted no evidence to persuade us that the alleged price modifications were agreed to by the Complainant. In addition, we find Complainant's witnesses to be more credible in their testimony that the Respondent was billed correctly the first time and that it never agreed to any

modification of the original contract prices for these three invoices. Therefore, we conclude that Respondent has not carried its burden of proving that the original contract prices were incorrectly reflected on the invoices or that the parties mutually agreed to a modification of the original contract prices for invoice numbers 159798, 160136 and 160209. We have previously concluded that the produce was accepted by the Respondent, that there was no evidence of breach of contract on Complainant's part and that there was no modification of the original contract terms. Therefore, Respondent is liable to Complainant for the full contract price of $68,006.50 for the thirty-six (36) lots of produce in question. Respondent has remitted a partial payment in the amount of $7,534.50, leaving a remaining balance due of $60,472.00.

Respondent has claimed several offsets to the amounts owed to Complainant for these produce purchases. It has been long held that "a party may offset losses from one produce transaction by deducting them from payment due on another." *McMillan Brokerage Co. v. Bushman Growers Sales, Inc.*, 32 Agric. Dec. 950 (1973); *Pilgrim Fruit Co., Inc. v. Valda Wooten*, 28 Agric. Dec. 260 (1969). However, Respondent still has the burden of proving that it is due money from a produce related transaction in order to obtain an offset. Respondent's first offset claim relates to 2,340 boxes of snow peas delivered to Complainant on or about March 28, 1996, for which Complainant allegedly agreed to compensate the Respondent in the amount of $2,223.00 for the cost of the boxes. Respondent contends that Complainant failed to compensate it for the cost of the boxes as previously agreed by the parties. The issue was discussed at hearing and Complainant admits that it indeed owes Respondent the amount of $2,223.00 for the cost of the boxes and does not contest offsetting this amount from any sums found to be due to it on the produce transactions at issue. Therefore, we conclude that Complainant owes Respondent in the amount of $2,223.00 for boxes supplied to Respondent and that this amount shall be offset against the $60,472.00 owed to Complainant for the produce transactions at issue.

The second offset claimed by the Respondent is for trucking fees amounting to approximately $8,344 allegedly owed by Complainant in connection with five different produce transactions shipped to it from the respondent's seller, Buena Vista Farms, on or about March 6th, 12th, 17th, 21st, and 27th, 1996 (Rx-BBB, CCC, DDD, EEE, FFF, GGG, HHH). We note at the outset that the produce contained in these five shipments were not part of the produce transactions contained in the complaint. The produce transactions contained in second offset allegation originated from Respondent's shipper, Buena Vista Farms and not from the shipper of the produce contained in the complaint (Rx-BBB, CCC, DDD, EEE, FFF, GGG, HHH).

Although a party is allowed to offset losses from one produce transaction from another, there is a jurisdictional requirement applicable to freight related claims. "This forum lack jurisdiction over the subject matter when there is only a

transportation contract in issue, which contract is not related to a produce transaction which is in issue." *Maine Banana Corp. v. Walter Davis*, 32 Agric. Dec. 983 (1973); *Reid & Joyce Packing Co. v. Touchstone*, 15 Agric. Dec. 884 (1956). Since the produce transactions at issue in Respondent's alleged freight offset are separate from the transactions at issue in the complaint, we cannot reach the question of whether the offset is proper and can be allowed. Therefore, Respondent cannot be allowed to offset the freight costs that it allegedly incurred on Complainant's behalf.

The third offset claimed by the Respondent is for alleged "consulting fees" due in conjunction with a contract between the parties by which Mr. Tan, respondent's president, would assist complainant in providing consulting services to Podesta Farm in exchange for a 2% of the 18% commission being paid to the complainant in connection with a separate marketing contract entered into between Complainant and Podesta Farm for the sale of perishable agricultural commodities grown on the Podesta Farm from 1991 to 1996.[1] According to Respondent, Complainant was party to a marketing contract with Podesta Farm to market all of its produce in exchange for an 18% commission from the sales generated from the produce. According to Respondent, its two percent (2%) "consulting fees" were to be paid by Complainant from the 18% commission paid to Complainant, in connection with its marketing contract with Podesta Farm, which was based on the total sales of produce generated from the Podesta Farm. Respondent alleges that it entered into a oral contract with the Complainant in 1991 to provide "consulting services" such as advice on the type of commodities to plant, growing techniques, seed choices and other general subjects relating to the growing of produce on the Podesta Farm in order to increase the profitability of the marketing agreement between complainant and Podesta Farm.

Mr. Tan asserts that he made several trips to Mexico with Respondent's principals prior to the terms of the "consulting contract" being finalized and thereafter (Tr. at 10-31). Mr. Tan testified that he mainly dealt with Albert Wu regarding the "consulting contract" who was the person who suggested the use of Mr. Tan's services to Complainant's primary principals (Tr. at 24-25, 154, 162). Mr. Tan asserts that, pursuant to the "consulting contract", there was no specific provision as to when payment of the consulting fees would take place, although they were to be computed on a yearly basis. Respondent's Mr. Tan stated that payment of the consulting fees was never requested from Complainant during the years 1991-1996 because Respondent felt that it would be best to wait until the Podesta Farm operations became more profitable (Tr. at 73-74).

There were two checks, totaling approximately $5,000, issued to Mr. Tan

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[1]Respondent originally asserted in its counterclaim that the alleged 2% commission to be paid to Mr. Tan was based on all of Complainant's total sales from 1991 to 1996 but modified the basis of its claim at hearing.

individually from complainant in 1991, that were allegedly portions of commissions due Respondent from Complainant. Mr. Tan testified that the parties' business relationship deteriorated when Albert Wu was terminated by the Complainant in 1996 (Tr. at 72). The evidence at hearing established that Complainant's principals, Camilla and John Lim, terminated the employment of Albert Wu on April 15, 1996 (Cx-D). According to Mr. Tan, it was not until after Mr. Wu was terminated effective April 15, 1996 that he realized that Complainant had no intention of continuing the "consulting contract" or paying Respondent the commissions due from 1991-1996 pursuant to the contract.

Complainant denies that it entered into any kind of "consulting agreement" with Respondent or Mr. Tan, verbal or otherwise, for the provision of services in connection with the planting, harvesting and sale of vegetables from its marketing agreement with the Podesta Farm. Complainant admits that Mr. Tan accompanied Mr. Lim and Mr. Wu on several trips to the Podesta Farm in early 1991 when it was considering entering into an agreement with the owners of the Podesta Farm to market their produce (Tr. at 34-42). Complainant also does not deny that it entered into a contract with Podesta Farm to act as its marketing agent in exchange for an 18% commission which was to be based on the total proceeds generated from the sale of the Podesta Farm produce. However, Complainant does deny that it entered into a contract with Respondent by which it would pay Respondent 2% of its 18% commission for consulting services.

Mrs. Lim testified that the checks that were issued to Mr. Tan were not for consulting services pursuant to the alleged "consulting contract" but rather money given to Mr. Tan by Mr. Wu for another reason while he was still employed with Complainant and had check signing authority. In support of its position that Respondent and Mr. Wu concocted the story of the alleged "consulting contract" after Mr. Wu was terminated, Complainant points to the fact that Respondent initially alleged, in its counterclaim, that it was to receive a two percent (2%) commission on all produce sales generated by Complainant from 1991 to 1996. However, Respondent, at hearing, changed its claim to the contract providing for Respondent to receive two percent (2%) commission for the produce sales generated from the Podesta Farm only (Tr. at 172-73). In addition, Mr. Wu created a sworn affidavit, at the behest of Mr. Tan, which basically mirrored Mr. Tan's original assertion of the two percent (2%) commission on all of Complainant's produce sales from 1991-1996 (Tr. at 249-51) (*Exhibit B as attached to Respondent's answer and counterclaim*). At hearing, Mr. Tan testified that its original assertion was merely a misstatement (Tr. at 172-73) and Mr. Wu testified that he was also initially mistaken in his affidavit regarding the manner in which the commission was to be computed (Tr. at 249-51).

There was a great deal of testimony provided and documents submitted, at hearing, in support of both parties' position. However, it is Respondent who bears the burden of proving first and foremost that the Secretary would have jurisdiction

over the alleged "consulting contract" since Complainant challenges the Secretary's jurisdiction over this counterclaim. If jurisdiction can be established, Respondent must overcome its burden of proving the existence of verbal contract and there terms therein. There are four basic jurisdictional requirements under the Act: (1) the transaction must involve "perishable agricultural commodities" (7 U.S.C. § 499a(4)); (2) the transaction must involve "interstate or foreign commerce" (7 U.S.C. § 499a(8)); (3) the person complaining must petition the Secretary within nine months after the cause of action accrues (7 U.S.C. § 499f(a)); and (4) Respondent must be a licensee under the Act or operating subject to the licensing requirements of the Act (7 U.S.C. § 499d(a))." *Jebavy-Sorenson Orchard Company v. Lynn Foods Corporation*, 32 Agric. Dec. 529 (1973).

Respondent alleges that Mr. Tan entered into an agreement with Complainant whereby he was to provide consulting services, on behalf of Respondent, in the form of "expert advice" as to the best kind of seeds to plant to obtain optimal results and other issues surrounding the successful planting and harvesting of the oriental vegetables on the Podesta Farm. Mr. Tan testified that he possesses a great deal of expert knowledge on the planting of Oriental vegetables that benefitted the Complainant by increasing the profitability of the marketing arrangement between Complainant and the Podesta Farm (Tr. at 21-24, 31-35). The statute requires that the transaction[s] involve a perishable agricultural commodity and Respondent alleges that Mr. Tan provided advice on the planting of produce which was to be subsequently sold by Complainant on behalf of Podesta Farm for an eighteen (18) percent commission fee. Although Respondent was not to be directly responsible for the sales of the produce, he was to share in the proceeds derived from the sale of the Podesta Farm produce in exchange for his consultation services on the planting and growing of produce on the Podesta Farm. The Secretary has recognized similar types of contractual arrangements, sometimes referred to as "joint ventures" which have been deemed to satisfy the first jurisdictional requirement of the statute. *See Eady v. Eady & Associates*, 37 Agric. Dec. 1589 (1978). Therefore, we find that Respondent has satisfied the first jurisdictional requirement of the statute.

Second, Respondent must demonstrate that the produce transaction[s] occurred in interstate or foreign commerce. For a party to be liable, it must have a contractual relationship involving the purchase and sale of produce – transportation, or the sale of bags, separate from the sale of produce is not such a relationship. *E.J. Harrison & Son v. A.E. Albert & Sons, Inc.*, 24 Agric. Dec. 884 (1965); *Reid & Joyce Packing Co. v. G.W. Touchstone*, 15 Agric. Dec. 884 (1956); *Anonymous*, 4 Agric. Dec. 332 (1945). The Podesta Farm is located in Mexico and the produce grown on that farm was being shipped from Mexico to various destinations within the United States. We find that the evidence contained in the record is sufficient to establish that the "consulting contract" would have involved produce transaction[s] occurring in interstate or foreign commerce which satisfies the second jurisdictional

requirement of the statute.

Third, Respondent must demonstrate that its action within nine months from when the cause of action accrued. A cause of action accrues at the time when the right to institute and maintain a suit arises which is the time that the event occurs and not at the time when a party discovers the facts or learns of his rights thereunder." *Calava Growers of California v. International Food Marketing, Inc.*, 40 Agric. Dec. 972 (1981); *Fresh Pict Foods v. Consumer's Produce*, 29 Agric. Dec. 163 (1970). *See also Louisville Cement Co., Inc v. Interstate Commerce Commission*, 246 U.S. 638, 62 L.Ed 914, 38 S.Ct. 408 (1918); *Boler Fruit & Veg. Co. v. Kenworthy*, 19 Agric. Dec. 226 (1960). In addition, a counterclaim arising out of different transactions than those covered by a timely complaint must be filed within nine months after the cause of action as to such counterclaim accrued. *Sandra v. Gardner*, 31 Agric. Dec. 128 (1972); *Calcagno Farms v. Spring Kist Sales*, 22 Agric. Dec. 406 (1963); *C.F. Smith Inc. v. Bushala*, 21 Agric. Dec. 1365 (1962).

A review of the Department's record indicates that a timely informal complaint was filed by the Complainant in July 1996 seeking reparation for produce sales made to respondent (*see report of investigation*). There is a mention in the records of the informal complaint proceeding that of respondent's allegation that it was owed money from Complainant in conjunction with a "consulting contract" but nothing informal or formal was filed with the Department by Respondent seeking reparation for these alleged consulting fees during the informal complaint stage. Complainant filed a formal complaint with the Department on November 1, 1996, which basically mirrored its informal complaint. On January 13, 1997, Respondent filed a timely answer and asserted several counterclaims including the one involving the alleged "consulting contract".

Respondent alleges that the parties entered into the "consulting contract" in 1991 and that the contract was in effect until April 1996 when Complainant terminated Albert Wu and thereafter allegedly severed its ties with respondent in relation to the "consulting contract". Respondent also states that, prior to Mr. Wu's termination, it never requested payment of the unpaid consulting fees from Complainant and Complainant never offered to pay him the consulting fees other than the two payments made in February 1992 and December 1993 for approximately $5,000. Respondent asserts that there was no specified provision as to when the consulting fees would be payable but that the fees would be computed on a yearly basis from the sales resulting from the perishable agricultural commodities originating from the Podesta Farm. Mr. Tan asserts that he intended to wait until the Podesta Farm operations became more profitable before requesting his lump sum payment. The alleged agreement between Complainant and Respondent was not a part of the marketing agreement entered into between Complainant and Podesta Farm but rather a completely separate agreement, upon which services were provided for the Podesta Farm and compensation was to be

based on sales of the Podesta Farm produce. Mr. Tan alleges it was not until Mr. Wu was terminated in April 1996, when it requested payment of the unpaid commission fees and became aware that Complainant was refusing to acknowledge the contract or pay the commissions due under the contract due from as far back as 1991.

The evidence indicates that Complainant had a yearly contract with Podesta Farm from 1991 to 1996 to market its produce for a commission fee of 18 percent and that Complainant was required to account to the grower on a regular basis while a particular year's crop was being marketed by complainant. It appears that Complainant was paid its 18% commission as compensation for its services provided under the marketing agreement with Podesta Farm within the same year that the sales for a given crop year was taking place. Since Respondent's alleged commission fees were to be indirectly based upon the proceeds generated from the Podesta Farm produce sales, those sales figures ostensibly would have been available at the end of the marketing period in a given year and Respondent would have been able to compute the alleged commission fees due to it for that given year. There is no evidence to suggest that Respondent ever made a formal request for the sales figures from the Podesta Farm produce sales prior to 1996. However, the fact that Respondent did not request an accounting regarding the Podesta Farm produce sales in the year in which they occurred does not mean that it was not capable of requesting that information for purposes of calculation of its commissions due under the alleged "consulting contract" or that it could not have instituted a suit to obtain those figures in order to seek reparation for monies allegedly owed by Complainant.

Based on the facts presented, we find that Respondent's cause of action accrued as early as the fall of 1992, when the sales from the 1991 planting season took place. At the very latest, Respondent's cause of action accrued on or about November 1992. Respondent could have filed an action against Complainant for recovery of its alleged consulting fees resulting from the sale of the Podesta Farm produce by Complainant on or about November 1992. The mere fact that Respondent never formally requested an accounting or payment of its commission fees until 1996 does not mean that Respondent's cause of action accrued in 1996 when Complainant refused to pay the total amount of commission fees alleged to be owed from 1991 to 1996. It is apparent that the Podesta Farm entered into a contract with Complainant in July 1991 for the marketing of its produce and that Complainant did, in fact, market the produce pursuant to this contract as early as the fall of 1992. The evidence shows that Complainant and Podesta Farm entered into a new contract every year subsequent to 1991 to cover its marketing agreement and that an accounting of the produce sales covered by respective contract was due prior to the signing of a new contract.

A cause of action accrues regardless of whether a party exercises his rights under that cause of action. Respondent cannot attempt to extend the accrual of its alleged cause of action by asserting that there was no specific period of time for

payment of the commission fees pursuant to the agreement. Respondent's cause of action accrued on or November 1992, it would have been necessary for Respondent to file its claim for reparation no later than August 1993. Respondent filed its counterclaim seeking reparation for the alleged "consulting contract" on January 13, 1997, which is far beyond the nine month statute of limitations period. The fourth jurisdictional requirement, that Respondent be licensed or subject to licensing under the Act, is satisfied. However, since Respondent does not meet the statutory requirements that the complaint be filed within 9 months of the accrual of the cause of action, the Secretary has no jurisdiction over Respondent's counterclaim for commissions due pursuant to a "consulting contract".

Respondent is liable to Complainant in the amount of $58,249.00 for produce purchased, received and accepted in interstate commerce. The counterclaims filed by Respondent regarding the trucking claims and the "consulting contract" are hereby dismissed based on the Secretary's lack of jurisdiction over these issues. Respondent's failure to pay Complainant this sum is a violation of section 2 of the Act for which reparation should be awarded. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest. *Louisville & Nashville Railroad Co. v. Sloss-Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916). Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate to award interest at a reasonable rate as part of each reparation award. *See Perl Grange Fruit Exchange, Inc. v. Mark Bernstein Co.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); *W.D. Crockett v. Producers Marketing Association, Inc.*, 28 Agric. Dec. 66 (1963). Complainant was required to pay a $300 handling fee to file its formal complaint. Pursuant to (7 U.S.C. §499e(a)), the party found to have violated section 2 of the Act is liable for any handling fees paid by the injured party.

Complainant and Respondent filed the appropriate forms for their claims for fees and expenses incurred in connection with the oral hearing. The parties' claims were properly served upon the parties and they were given an opportunity to object to the opposing party's claims. Neither party filed an objection to the opposing party's claim for fees and expenses. Fees and expenses will be awarded to the extent that they are reasonable. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieri Co.*, 38 Agric. Dec. 269 (1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977). It is the province of the Secretary to determine the reasonableness of the requested fees and expenses. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The prevailing party is the party in whose favor a judgment is entered even if the party does not recover its entire claim. *Bill Offutt v. Berry*, 37 Agric. Dec. 1218 (1978); *Mountain*

Tomatoes, Inc. v. E. Patapanian & Son, Inc., 48 Agric. Dec. 707 (1989).

We have reviewed Complainant's claim for fees and expenses. Complainant has claimed 3.75 in preparation of its answer and response to Respondent's cross-claim. It has been held that expenses which would have been incurred in connection with the case if that case had been heard by shortened procedure may not be awarded under section 7(a) of the Act. *Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977). There Complainant's claim for recovery of $731.25 in preparation of answer and response to cross-claim are disallowed since Complainant would have had to incur these costs regardless of whether the matter was heard by oral hearing. Complainant claims $2,812.50 representing 11.25 hours at $250.00 per hour for scheduling and preparation of the oral hearing. We will allow Complainant's counsel an hourly rate of $200.00 as reasonable based on the issues involved. We find that the 11.25 hours claimed by Complainant is a reasonable amount of time for preparation of the oral hearing. Therefore, Complainant will be allowed $2,250.00 for costs incurred in preparation for the oral hearing.

Complainant claims that it incurred costs of $5,000.00 in connection with its counsel's travel to and from the oral hearing in New York City. This claim is disallowed since it is our policy to not allow attorney's fees for time spent in travel. *See Golden Harvest Farms, Inc. v. Stanley Produce Co., Inc.*, 38 Agric. Dec. 727 (1979). Complainant requests reimbursement for 21.25 hours spent in scheduling continuation dates for the hearing and in preparation for the remainder of the hearing held by telephone conference. Based on the complexity of the issues involved, we will grant Complainant 15 hours at $200.00 per hour as being reasonable costs incurred by Complainant. Therefore, Complainant will be allowed to recover $3,000.00 in connection with costs incurred in scheduling hearing dates and preparation for hearing. Complainant claims 12.50 hours spent at the hearing which we find to be reasonable. Complainant will be allowed to recover costs incurred for the 12.50 hours spent at the hearing at $200.00 per hour totaling $2,500.00. Complainant also requests recovery for 38 hours spent in preparing its brief and proposed findings of fact. Expenses which would have been incurred under the shortened procedure are not recoverable under section 7(a) of the Act which would include findings of fact, conclusions of law and post hearing briefs. *See Mountain Tomatoes, Inc. v. E. Patapanian & Son, Inc.*, 48 Agric. Dec. 707 (1989); *Pinto Bros. v. F.J. Bolestrieri Co.*, 38 Agric. Dec. 269 (1979); *Nathan's Famous v. N. Merberg & Son*, 36 Agric. Dec. 243 (1977). Therefore, Complainant's request is disallowed.

Complainant has claimed $1,526.42 for expenses incurred in airline and hotel expenses for the hearing held in New York. Complainant did not include an itemization as to how these expenses were computed, including copies of airline tickets and hotel receipts. However, respondent did not object to the Complainant's

claim for recovery for its airline and hotel expenses. Therefore, we will allow Complainant's request for recovery of costs for airline and hotel expenses totaling $1,526.42 as being a reasonable expense. In addition, Complainant seeks recovery in the amount of $1,962.26 for costs incurred in obtaining hearing transcripts. We find this cost to be reasonable and therefore allow it as a reasonable expense. In total, Complainant will be allowed to recover $11,238.68 as reasonable fees and expenses incurred in connection with the oral hearing.

Order

Within 30 days from the date of this order, Respondent shall pay to Complainant, as reparation, $58,249.00 with interest thereon at the rate of 10 percent per annum from July 1, 1996, until paid plus the amount of $300.

Within 30 days from the date of this order, Respondent shall also pay to Complainant, as reasonable fees and expenses incurred in connection with the oral hearing, the amount of $11,238.68.

Copies of this order shall be served upon the parties.

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